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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-1185

MEMORIAL CONSULTANTS, INC.,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. GEORGE W. LINDBERG, COMPTROLLER OF THE STATE OF ILLINOIS,
Appellee.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT.

REPLY TO MOTION TO DISMISS.

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There are several parts of the Motion to Dismiss that need correction and/or clarification. At footnote 1 page 5 of the MOTION it is suggested that our statement of fact is erroneous and at page 15 of the MOTION it is urged that "the Act does not deny Appellant equal protection of the law" because it applies to traditional, at need, funeral industry members "who elect to collect for such commodities in advance of actual need."

ARGUMENT.

1.

THE FACTS STATED ON PAGE 4 OF THE JURISDICTIONAL STATEMENT ARE COVERED BY STIPULATION AND STAND ADMITTED.

In fairness to the Assistant Attorneys General appearing on the Motion to Dismiss it should be pointed out that neither of them participated in any aspect of the trial level proceedings including the preparation of the stipulation. [R. C-207 thru C-210]. Thus, they could not have known that in order to shorten the stipulation paragraph 25 thereof explicitly "incorporated into this stipulation" the allegations of Appelant's verified counterclaim.[1]

By footnote 1 at page 5 of the MOTION, appellee is apparently trying to remove from this Court's consideration enumerated facts 1 and 5 as stated at page 4 of the Jurisdictional Statement, viz:

> "1. That appellant's cost of vaults sold is less than 35% of gross vault receipts and together with other operating expenses produces an average net profit margin of 5%. [R. C-164]."
>
> "5. That appellant, and those similarly situated, provide the only horizontal competition to funeral directors whose sales are principally made to decedent's next of kin between the time of death and the time of burial . . . [R. C-162 & C-199]."

In any event, appellee does not take exception to the findings contained in "Report by the Presiding Officer on Proposed Trade Regulation Rule Concerning Funeral Industry Practice [16 C. F. R. Part 453, Public Record 215-46 (July 1977)]" [Jurisdictional Statement, App. D, pp. A-14 thru A-22] including the following:

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1. As originally filed the counterclaim was not verified but thereafter, in response to Appellee's motion the trial court ordered verification. [R. C-193 & C-199 & C-200].

> "Among devices used by the funeral industry to restrict pre-need sales are state laws and regulations that require a 100% burial trust fund deposit of pre-need funds * * * Without funds to pay overhead, prospective sellers of pre-need funerals will not enter this market. * * * As a consequence, if a seller will not sell, the consumer is deprived of the opportunity to choose freely among alternatives which should be available to him." [Jurisdictional Statement, App. D, A-20].

> "An official of the Comptroller of the State of Illinois made a study of the burial trust law of Illinois. * * * The study indicates that the deposit of the current cost (not the sales price) of merchandise or services * * * would provide adequate funds to deliver such goods and services at any given time in the future. * * * The study * * * substantiates the position that a 100% deposit is not necessary as a requirement to guarantee delivery of promised funeral goods and services at a later date." [*Ibid,* A-21].
>
> "The funeral consumer can avoid problems associated with at need sales by making funeral arrangements in advance of need. His opportunity to do so is presently restricted by the 100% trust fund laws * * *. These restrictive laws have been sponsored by traditional (at need) funeral industry members." [*Ibid,* A-22].

2.

THE CLAIM THAT THE ACT IS CONSTITUTIONAL BECAUSE IT CAN APPLY TO TRADITIONAL, AT-NEED FUNERAL INDUSTRY MEMBERS IGNORES REALITY AND THE ANTAGONISM OF THE INDUSTRY TO PRE-NEED ARRANGEMENTS BY ANYONE INCLUDING ITS OWN MEMBERS.

The fact that the Illinois Funeral or Burial Trust Fund Act facially applies to "funeral directors, undertakers, embalmers or any other persons who elect to collect for such commodities in advance of actual need" [Motion to Dismiss, p. 15] does not mean that in practice funeral industry members engage in pre-

need arrangements. Indeed, the record is replete with examples to the contrary, e.g.:

> 1. In this case, the Illinois State Funeral Directors intervened as a party plaintiff and only withdrew when appellant counterclaimed "that the association members have combined to eliminate competition and to restrain retail trade of burial vaults in violation of the Illinois Antitrust Act." [Motion to Dismiss, p. 5].
>
> 2. The Federal Trade Commission has "stated that it has reason to believe that 'Actions by funeral industry members to inhibit economical funeral offerings, pre-need arrangements, immediate disposition services, or memorial societies disadvantage consumers by restricting their choice of funeral arrangements and may suppress competition in that industry'." [Jurisdictional Statement, App. D, A-17].
>
> 3. "[T]he at-need funeral industry has sponsored and supported state laws which prevent the solicitation of consumers for the purchase of funeral service merchandise before death" [*Ibid*, A-19] which obviously apply with special force to industry members themselves.

Appellee's claim that "that Act does not deny Appellant equal protection of the law" because it can apply to funeral directors is not only a sham argument but points up the sham nature of the statute itself in light of the facts as they really are.

CONCLUSION.

Appellee concedes this Court's jurisdiction under 28 USC §§ 1257(2) and 2101(c) [Motion to Dismiss, pp. 2-3] and when tested by the critical and undeniable facts which he seeks to overlook and obscure the Act in controversy clearly offends the Equal Protection and Due Process Clauses of the Fourteenth Amendment. It prohibits Appellant's otherwise lawful business, it has no rational connection between legislative means and purpose, alternative means to achieve the legislative objective are readily available and in light of the emerging concerns of the Federal Trade Commission with regard to the anticompetitive effects of the so-called burial trust fund laws it cannot be fairly said that the statute reflects legislative concern for a purpose legitimately supporting its 100% trusting requirements.

For the foregoing reasons and for the reasons stated in the Jurisdictional Statement, it is clear that the Court has jurisdiction and that the question presented is substantial and involves matters of public importance.

Respectfully submitted,

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